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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 BOARDS OF TRUSTEES OF THE
11 CEMENT MASONS &
12 PLASTERERS HEALTH &
WELFARE TRUST, et al.,

13 Plaintiffs,

14 v.

15 CONCRETEMAN, INC., et al.,

16 Defendants.

CASE NO. C13-1698JLR

ORDER DENYING MOTION
FOR PARTIAL SUMMARY
JUDGMENT

17 Before the court is Defendant Global Contractors, LLC's ("Global") motion for
18 partial summary judgment. (Mot. (Dkt. # 10).) This case involves labor law. Global
19 asks the court for partial summary judgment with respect to two issues in this case that
20 would narrow the scope of the litigation moving forward. (*See id.*) Specifically, Global
21 asks the court to hold that the operative labor agreement in this case is expired and that,
22 as a matter of law, Global is not the "alter-ego" of Defendant Concreteman, Inc.

1 (“Concreteman”). (*See id.*) For the reasons described below, the court DENIES Global’s
 2 motion. The operative labor agreement is not expired, and there are fact issues
 3 precluding summary judgment on the “alter-ego” issue. Accordingly, Global is not
 4 entitled to summary judgment with respect to either of these issues.

5 **I. BACKGROUND**

6 This is a labor dispute between a concrete company and several unions.
 7 Defendant Concreteman is a subcontractor specializing in pervious concrete—a porous,
 8 permeable form of concrete that allows water to easily pass through it into the ground.
 9 (*See* Fain Decl. (Dkt. # 11) ¶¶ 4-5.) Concreteman has been doing business in Washington
 10 since 1994. (*Id.* ¶ 2.) On April 14, 2008, Concreteman entered into a “Compliance
 11 Agreement” (“CA”) with a local cement masons union referred to as “Local 528
 12 affiliated with the Operative Plasterers and Cement Masons International Association,
 13 AFL-CIO” (“Union”). This dispute arises directly out of the CA.

14 The CA is not an ordinary collective bargaining agreement (“CBA”). Instead, it is
 15 a contract under which third parties, in this case Concreteman, agree to abide by the
 16 terms of an already-existing CBA. (*See, e.g.,* Fain Decl. Ex. A.) The CA is what is
 17 known as a “pre-hire agreement.” (*See id.*); *Orange Belt Dist. Council of Painters No. 48*
 18 *v. Kashak*, 774 F.2d 985, 987-88 (9th Cir. 1985). A pre-hire agreement is “a labor
 19 contract negotiated between a construction employer and a ‘union [that] does not
 20 represent a majority of the employees at the time of contract execution.’” *Id.* (citing
 21 *Const. Erectors, Inc. v. NLRB*, 661 F.2d 801, 804 (9th Cir. 1981)). Thus, Concreteman
 22 agreed to abide by a CBA despite the fact that its employees were not actually unionized

1 at the time the CA was signed. (*See id.*) Specifically, Concreteman agreed to abide by a
2 CBA between the Union and “individual members of the Associated General Contractors
3 of Washington.”¹ (Fain Decl. Ex. A.)

4 As part of the CA, Concreteman agreed to make contributions into certain benefit
5 trust funds. Signatories of the CBA agreed to pay various “fringe benefits” into Union-
6 operated trust funds, including health and security, pension, and other benefits. (*Id.* Ex. B
7 at 17-20.) Concreteman agreed to do this when it signed the CA, committing to abide by
8 the terms of the operative CBA. (*Id.* Ex. A, B.)

9 Until recently, Concreteman honored this obligation. (*Id.* ¶¶ 17, 26.)
10 Concreteman made regular payments into the specified trust funds based on the number
11 of hours worked by its employees in accordance with the CBA. (Bernett Decl. (Dkt.
12 # 18) Ex. A (record of contributions).) However, around June 2013, the payments
13 allegedly ceased and Concreteman stopped providing the union with information
14 necessary to determine what payments were due. (*Id.*; Compl. (Dkt. # 1) ¶¶ 19-21.)

15 The trust funds brought this action to collect monies allegedly owed. (*See*
16 *generally* Compl.) The trust funds asked for injunctive relief to enforce the terms of the
17 CA and the CBA. (*Id.* ¶¶ 14-21.) In addition to Concreteman, the trust funds named
18 Global as a defendant. Global is a general contracting company owned by the same
19 husband and wife that own Concreteman—Denise and Charles Fain. (*Id.* ¶¶ 7, 9.) The
20 trust funds allege that Global is an “alter-ego” of Concreteman and that, accordingly,

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22 ¹ Concreteman asserts that it signed the CA because it was pressured to do so “in order to
relieve pressure caused by the picket line” at a particular job site. (Fain Decl. ¶ 14.)

1 under relevant principles of labor law, Global should be held liable for Concreteman's
2 failure to make required contributions. (*Id.* ¶¶ 22-31.)

3 Global filed this motion for summary judgment. In the motion, Global asks the
4 court to find that (1) the CA has expired and therefore the court lacks jurisdiction over
5 this action; and (2) Global is not the alter-ego of Concreteman but a separate company
6 that cannot be held liable for any failure to contribute by Concreteman. (*See Mot.*)

7 II. ANALYSIS

8 A. Summary Judgment Standard

9 Summary judgment is appropriate if the evidence, when viewed in the light most
10 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to
11 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
12 P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of L.A.*,
13 477 F.3d 652, 658 (9th Cir. 2007). A fact is “material” if it might affect the outcome of
14 the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is
15 “genuine” if the evidence is such that reasonable persons could disagree about whether
16 the facts claimed by the moving party are true. *Aydin Corp. v. Loral Corp.*, 718 F.2d
17 897, 902 (9th Cir. 1983).

18 [T]he issue of material fact required . . . to be present to entitle a party to
19 proceed to trial is not required to be resolved conclusively in favor of the
20 party asserting its existence; rather, all that is required is that sufficient
evidence supporting the claimed factual dispute be shown to require a jury
or judge to resolve the parties' differing versions of the truth at trial.

21 *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968).

1 The court is “required to view the facts and draw reasonable inferences in the light
2 most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).
3 The court may not weigh evidence or make credibility determinations in analyzing a
4 motion for summary judgment because these are “jury functions, not those of a judge.”
5 *Anderson*, 477 U.S. at 249-50.

6 The moving party bears the initial burden of showing there is no genuine issue of
7 material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S.
8 at 323. If the moving party meets his or her burden, the non-moving party “must make a
9 showing sufficient to establish a genuine dispute of material fact regarding the existence
10 of the essential elements of his case that he must prove at trial.” *Galen*, 477 F.3d at 658.

11 **B. Global’s Expired Agreement Argument**

12 To begin, Global argues that there is “no question” that the CA expired before the
13 relevant timeframe, depriving the court of jurisdiction over this action. (Mot. at 7.) As a
14 general matter, Global is correct that district courts lack jurisdiction to adjudicate
15 disputes of this nature if the operative bargaining agreement between the parties has
16 expired. *Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight*
17 *Concrete Co., Inc.*, 484 U.S. 539, 550 (1988); *UA Local 343 United Ass’n of Journeymen*
18 *v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir. 1995). Global argues that the CA
19 expired in June, 2012, and that this action relates only to conduct that occurred after that
20 date. (Mot. at 7.)

21 Global is mistaken—the agreement has not expired. Global argues that the CA
22 expired when the underlying CBA expired, in June 2012, notwithstanding the fact that

1 the CBA itself was renewed. (*Id.*) But the CA requires a different result. The CA
2 explicitly states that it continues in effect if the underlying CBA is renewed or replaced
3 with a new CBA, unless and until the CA is terminated by one of the parties:

4 This Compliance Agreement shall be effective as of the date of signing and
5 shall continue in effect during the term of the [CBA] and its supplements,
6 renewals, amendments, modifications, extensions, successors, and
7 substitutes[.] Either Local 525 or the Employer may terminate this
8 Compliance Agreement as of the termination date specified in the [CBA] or
its successors by giving the other party written notice of an intention to
terminate not less than sixty (60) days, nor more than ninety (90) days,
prior to the expiration date specified in the [CBA] in effect at the time of
giving notice.

9 (Fain Decl. Ex. A.) Here, it is undisputed that the union successfully negotiated a
10 successor CBA and that neither party terminated the CA in a timely fashion. (Branfield
11 Decl. (Dkt. # 15) Ex. Transcript 2 at 15; Surreply (Dkt. # 23) at 3; Coffelt Decl. (Dkt.
12 # 17) ¶ 5.) Consequently, the CA remains in effect by its unambiguous terms. (*See* Fain
13 Decl. Ex. A.)

14 Indeed, Global appears to concede this point. In its initial motion, Global asserts
15 the above argument. (*See* Mot. at 6-7.) Plaintiffs respond with a rebuttal argument based
16 on the language of the CA, but Global does not respond to Plaintiffs' rebuttal argument,
17 choosing instead to raise new and different arguments. (Compare Resp. at 6-8 *with* Reply
18 (Dkt. # 20) at 1-4.) Failure to respond to an argument may be treated as an admission
19 that the argument has merit. *See, e.g., Lombardi v. Columbia Recovery Grp., LLC*, No.
20 C12-1250 RSM, 2013 WL 5569465, at *4 (W.D. Wash. Oct. 9, 2013). In any event, the
21 CA clearly demarcates its effective dates, precluding Global's argument that the CA has
22 expired.

Global raises several additional arguments on this issue, but none are persuasive. Specifically, Global argues that it was permitted to unilaterally terminate or repudiate the CA because there is turnover in its work force and because the Union “re-opened” the CBA. (Mot. at 8-9; Reply at 1-4.) However, these theories rely on disputed facts (*compare, e.g.,* Mot. at 8-9 *and* Reply at 1-4 *with* Resp. at 8-11 *and* Surreply at 1-3), making summary judgment inappropriate.² *See* Fed. R. Civ. P. 56(a); *Aydin*, 718 F.2d at 902. More to the point, Global does not raise any convincing arguments or evidence that the correct result is anything other than what is dictated by the plain terms of the CA.³

In sum, Global has not demonstrated that it is entitled to summary judgment on this issue. Global’s motion is DENIED on this issue.

C. The Alter-ego Issue

Next, Global moves for summary judgment that it is not the alter-ego of Concreteman. (Mot. at 10-14.) Global argues that it is a separate company from Concreteman with a separate business model and separate purpose—in brief, Global is a general contractor and Concreteman is a subcontractor. (Fain Decl. ¶¶ 4-8.) Global argues that the requirements for alter-ego liability are not met even though Global and

² These disputed facts also prevent the court from granting Plaintiffs’ very brief cross-motion for summary judgment. Plaintiffs present a cursory argument that the court should grant summary judgment on the question of whether Concreteman is bound by the terms of the CBA. (Resp. at 10-11.) The court will not grant this motion at this time given the presence of disputed facts, the paucity of briefing on this issue, and the fact that Concreteman (which did not join in this motion) has not had an adequate opportunity to respond.

³ The court also DENIES as moot the motion to strike contained in Plaintiffs’ surreply. (Surreply (Dkt. # 23) at 3.) Any ruling on the motion to strike would not affect the outcome of the summary judgment motion.

1 Concreteman are both owned by Mr. and Ms. Fain, have many of the same employees,
2 and otherwise resemble each other in various ways. (Mot. at 10-14.)

3 The parties agree on the governing law. They agree that the alter-ego doctrine is
4 “designed to prevent employers from escaping their collective bargaining obligations by
5 shifting work to non-union firms they also own.” *S. Cal. Painters v. Rodin & Co.*, 558
6 F.3d 1028, 1032 (9th Cir. 2009). Under the alter-ego doctrine, union employers are not
7 allowed to create non-union alter-egos for the fraudulent purpose of avoiding their
8 collective bargaining obligations. *Id.* To determine whether a company is the alter-ego
9 of another company, the first step is to determine whether the two companies are a
10 “single employer.” *Id.* The second step is to determine if the non-union alter-ego is
11 tainted by union animus or is a sham to avoid collective bargaining obligations. *UA*
12 *Local 343*, 48 F.3d at 1470.

13 The second step of this inquiry is where the parties disagree.⁴ In particular, they
14 disagree about whether Mr. and Ms. Fain used Global as a “sham” to avoid collective
15 bargaining obligations. Global contends that it made no attempt to avoid union
16 obligations. Plaintiffs dispute that contention.

17 Plaintiffs present a coherent body of evidence to support their position. Under
18 Plaintiffs’ version of the facts, Mr. Fain controls the labor relations of both companies
19 (*see* Dwarzski Decl. (Dkt. # 19) Ex. B), Global and Concreteman hold themselves out as

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21 ⁴ The parties agree that there are factual issues regarding the “single employer” inquiry
22 and that it is not necessary to resolve these issues in ruling on Global’s motion. (*See, e.g.*, Mot.
at 5.)

1 one company (*see* Coffelt Decl. Ex. C), and there is evidence of Mr. Fain’s union animus
2 (Dwarzski Decl. Ex. A). In particular, there is testimony by a union representative, Mr.
3 Coffelt, that Mr. Fain became irritated with the union upon learning he would have to pay
4 benefits for a certain employee, abruptly terminated a meeting, and thereafter transferred
5 all cement work from Concreteman, the union company, to Global, the non-union
6 company. (*See id.* Ex. A at 46-48; Ex D.) Plaintiffs point out the suspicious timing—
7 namely, the fact that Mr. Fain transferred Concreteman’s work to Global shortly after
8 becoming upset about its union obligations. (Resp. at 13.)

9 This theory is supported by some of Global’s evidence as well. Global’s evidence
10 suggests that Mr. Fain may have had an ongoing feud with the union and was not on
11 friendly terms with union representatives, who he describes as “harassing” and
12 “threatening” him and his employees. (Fain Decl. ¶ 6.) Mr. Fain testifies that “[t]he
13 Cement Masons Union only seems to want to collect our dues and to shut down jobs
14 being done by non-union contractors. No one from the Union bothers to contact us. If
15 they had, they would have learned that we don’t want to be a union shop.” (*Id.* ¶ 8.)
16 Global also presents evidence that its workers prefer not to be in a union because being
17 non-union means the workers get their fringe benefit payments in their paychecks. (Ward
18 Decl. (Dkt. # 13) ¶ 3; Vigue Decl. (Dkt. # 14) ¶ 3-4 (“There was almost unanimous
19 agreement that the employees didn’t wish to be represented by the Cement Masons
20 Union.”).) All in all, there is enough evidence for a reasonable jury to conclude that Mr.
21 Fain transferred all of Concreteman’s work to Global for the purpose of avoiding union
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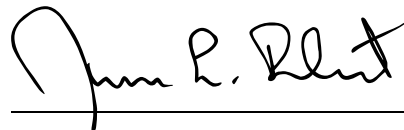
1 obligations. *See Aydin*, 718 F.2d at 902. There is also enough evidence for a reasonable
2 jury to find union animus.⁵

3 Accordingly, summary judgment is not appropriate on the alter-ego question.⁶ As
4 discussed, there is a genuine dispute with respect to a fact that is material to this issue.
5 The factual dispute is material because it bears directly on whether or not Global may be
6 held liable as an alter-ego for Concreteman's alleged failure to contribute to Plaintiffs'
7 trust funds. *See UA Local 343*, 48 F.3d at 1470; *Anderson*, 477 U.S. at 248. For these
8 reasons, Global's motion is DENIED on this issue.

9 III. CONCLUSION

10 For the foregoing reasons, Global's motion for partial summary judgment is
11 DENIED (Dkt. # 10).

12 Dated this 12th day of May, 2014.

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15 JAMES L. ROBERT
16 United States District Judge

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20 ⁵ Global presents evidence to the contrary, but it is nowhere close to enough for the court
to conclude that no reasonable jury could accept Plaintiffs' evidence and version of events.

21 ⁶ Global also discusses the so-called "reverse alter-ego" doctrine, which has no
22 application to this case. (*See Mot.* at 11.) Likewise, Global's discussion of the estoppel doctrine
has no relevance to this case. (*See id.* at 14.)